Petition

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81-510

CASE NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FLORIDA STATE UNIVERSITY, et al.

Petitioners,

v.

DR. ANJALI A. JOSHI,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners seek a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

1. Did the court of appeals err in holding that Title VII authorizes the trial court to award nominal damages and attorney's fees even when the trial court finds that "those chosen were thought to be, for any nondiscriminatory reason, better suited for the position?"

2. Did the court of appeals disregard this Court's decision in Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981) and fail to give credence to the principles recognized therein by requiring that

the Employer in a Title VII case prove nondiscrimination by a preponderance of the evidence in rebutting the prima facie case?

3. Did the court of appeals err by requiring the Employer in a Title VII case to do more than simply raise a genuine issue of fact as to whether there was a legitimate nondiscriminatory business reason for making the challenged employment decision?

4. Did the court of appeals err when it disregarded the trial court's finding that the unrefuted statistical proof was relevant in showing absence of discriminatory motive on the part of the Employer, where the Employer had hired substantially more minority physicians than existed in the labor

market during the pertinent time period?

5. Did the court of appeals err in requiring Employer to continue considering an applicant for employment even after the applicant was rejected?

PARTIES

Petitioners (Defendants):

FLORIDA STATE UNIVERSITY (FSU); BERNARD F. SLIGER, in his capacity as President of FSU; DR. HOMER OOTEN, in his capacity as Director of Business Affairs; DR. ROBERT HUNTER, in his capacity as former Director of FSU Health Center; DR. PHILIP ROND, as Director of the FSU Health Center.

Respondent (Plaintiff)

DR. ANJALI A. JOSHI

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OFFICIAL REPORTS OF CASE

The decision of the court of appeals is reported at 646 F.2d 981. The decision of the district court is reported at 486 F.Supp. 86.

GROUNDS FOR INVOKING JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 1, 1981. Petitions for rehearing by the panel and rehearing en banc were denied by order entered July 23, 1981. The order staying issuance of the mandate pending petition for writ of certiorari to and including September 15, 1981, was entered and filed on August 24, 1981. Jurisdiction is conferred by 28 U.S.C. Sections 1254(1) and 2101(c).

The appeals court rendered a decision in conflict with the decisions of another court of appeals on the same matter; has decided an important question of federal law which has not been, but should be, settled by this Court; and has decided a federal question in a way in conflict with applicable decisions of this Court. There is a conflict among decisions, and the Court should exercise its power of supervision.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964:

1. 42 U.S.C. Section 2000e-2(a)(1), (2)

"(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Pub.L. 88-352, Title VII, Section 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, Section 8(a),(b), Mar. 24, 1972, 86 Stat. 109.

2. 42 U.S.C. Section 2000e-5(g)

"Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice

charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-

3(a) of this title."

Pub.L. 88-352, Title VII, Section 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, Section 4, Mar. 24, 1972, 86 Stat. 104.

3. Section 2000e-5(k)

"Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

Pub.L. 88-352, Title VII, Section 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, Section 4, Mar. 24, 1972, 86 Stat. 104.

STATEMENT OF THE CASE

Petitioners are a state university, certain staff members of the university, and the president of the university. They were defendants in the trial court.

The Plaintiff is the Respondent. In this petition, the Respondent will be identified as Plaintiff, and the Petitioners will be identified as Employer.

Plaintiff, a female physician, unsuccessfully applied for a position at the Florida State University Health Center. Claiming that she was not hired because of her sex, religion and national origin, Plaintiff brought suit against the Defendant under Title VII of the Civil Rights Act of 1964, §701, 42 U.S.C.A., §2000e, et seq. The alleged basis for jurisdiction was 28 U.S.C.,

§§1343(4), 2201 and 2202, and 42 U.S.C., §2000e-f.

The gist of the Plaintiff's complaint was that she filed her application for employment at Florida State University for the position of staff physician at the university health center in 1974. After the Plaintiff was interviewed for the job she was not hired, but the position remained open and the Employer continued to seek applicants from persons of the Plaintiff's qualifications. Notwithstanding Plaintiff's qualifications, she claims that because she is a female Indian, Hindu, her application was rejected because of her sex, national origin, or religious affiliation.

The district judge held the Employer presented creditable evidence to show

that severe budgetary constraints and a managerial struggle among physicians and supervisors at the health center were the reasons the Plaintiff was not hired. Although the district court held that the Plaintiff had made out at least the general requirements of the prima facie case, some question existed as to the sufficiency of her qualifications for the position.

Upon the burden shifting to the Employer to articulate a legitimate nondiscriminatory reason for its actions, the district court found the decision not to hire the Plaintiff was based on legitimate reasons that had nothing to do with either her national origin or sex. These reasons were the austerity program that was implemented; the

selection as staff physician of the former director of the health center who resigned in the midst of this controversy, a physician with many years standing and superior qualifications; and, after being rejected for employment, Plaintiff's advertising in a local newspaper that she was associating to practice medicine with another doctor in a neighboring county. The final hiring of additional doctors did not take place until after the Plaintiff was no longer actively in the running for employment at the health center. Employer effectively countered any allegation of pretext by showing unrefuted statistical evidence that during the entire time in consideration in the suit, the health center employed sub-

stantially greater proportions of minority and female doctors than were available in the labor market. Inasmuch as the Plaintiff had failed to prove discrimination by preponderance of the evidence, the action was dismissed with prejudice as to all Defendants.

The Plaintiff appealed pursuant to 28 U.S.C. §1291 to the United States Court of Appeals for the Fifth Circuit. The appeals court based its reversal on the district court's determination that the Plaintiff was not discriminated against when additional physicians were hired because she was no longer actively in the running for employment at the health center at that time. 646 F.2d at 989. The appeals court rejected the trial court's consideration of any

statistical evidence, concluding that such statistical evidence might be relevant to negate an inference of discriminatory motive but was insufficient to rebut the prima facie case of a specific individual in a disparate treatment case, citing Cross v. United States Postal Service, 639 F.2d 409 (8th Cir. 1981).

The appeals court went on to direct the trial court as follows:

> ". . . On remand the district court must determine whether the defendants produced or are now able to offer evidence of a legitimate, nondiscriminatory reason explaining their failure to hire Dr. Joshi and produced evidence that those ultimately chosen had qualifications equal to those of the plaintiff. . . ." 646 F.2d at 990

In an instructive footnote, the appeals court advised the trial court to consider awarding nominal damages

even if the trial court finds that those chosen were thought to be, for any nondiscriminatory reason, better suited for the position. 646 F.2d at 991, n.33.

REASONS FOR GRANTING THE WRIT

The appeals court has erroneously required the Employer to prove its articulated, nondiscriminatory reasons for not hiring Plaintiff by a preponderance of the evidence.

This standard of proof is clearly in conflict with the standard expressed in the decisions of this Court.

> "The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . [T]o satisfy this intermediate burden, the employer need only produce admissable evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."

Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089,1094 (1981)

This same erroneous attempt by the appeals court to reimpose its pre-Burdine burden of persuasion on the Employer is likewise in conflict with the Burdine standard as expressed by other circuit courts of appeal.

> ". . . [O]nce a Title VII plaintiff established a prima facie case, the burden shifts to the defendant to articulate a believable nondiscriminatory reason for the employment action . . . In the case at hand, therefore, the magistrate quite properly placed no burden of persuasion upon the defendant." St. Peter v. Secretary of the Army, 4 Empl. Prac. Guide, (CCH), (26 Empl. Prac. Dec.) ¶ 31, 943, at 21,230 (D.C. Cir. July 1, 1981)

It is even in conflict with its own circuit decision.

> "Mrs. Olafson proved a prima facie case of discrimination . . . At that point a burden of production--not persuasion--shifted to the

defendants." Olafson v. Dade County School Bd., 651 F.2d 393 (5th Cir. 1981)

In light of the Burdine standard established by this Court, the appeals court discussion and rejection of the trial court's finding that Plaintiff was not "in the running" for employment in the third relevant time period is error. The proper issue is whether the articulated reason for not hiring her at that time raises a genuine issue of fact.

At trial, the Employer's articulated reason for not hiring Plaintiff in September, 1976, was that Plaintiff was not considered to be in the running, i.e., was not an active applicant for employment at that time. Employer produced credible evidence on this point:

Employer's letter dated March 19, 1976, rejecting her application; Plaintiff's announcement that she had entered the private practice of family medicine in association with a physician in a neighboring county, as published in the Tallahassee Democrat in July, 1976; and, the absence of any expression by Plaintiff of continuing interest in employment or in reapplying for employment after the March rejection. With respect to this latter fact, the appeals court referred to and quoted from an Employer's memo, claiming that memo was proof that Plaintiff was still an active applicant. But the appeals court curiously overlooked the succeeding sentences which stated:

> "It should be noted that following her consideration by the health

> center, she accepted alternative employment, and to the best of our knowledge, is presently engaged in the practice of family medicine. I would appreciate your advice regarding her active pursuit of this charge and interest in it, since she has not recently expressed any continuing interest in employment at the university health center." (Defendants' Exhibit No. 7)

Whether such pieces of evidence are persuasive enough to withstand pretextual rebuttal is a question that may be asked at the conclusion of the trial; but the appeals court erroneously imposed that preponderance of evidence standard on Employer at the intermediate stage by holding that Employer must now go back and produce more evidence to rebut Plaintiff's prima facie case.

The evidence adduced at trial on this issue shows that Plaintiff did not meet her ultimate burden of proving the

existence of a discriminatory motivation by a preponderance of the evidence. But the appeals court has erroneously applied such an ultimate burden of persuasion to the Employer by weighing its articulated legitimate reasons and then reversing the trial court and requiring it to hear new, presumably more persuasive, reasons from Employer in rebutting Plaintiff's prima facie case.

The clear impact of such reasoning is to once again require the Employer at the intermediate stage to prove its articulated legitimate reasons by a preponderance of the evidence. Thus, the Employer is required to rebut not simply a prima facie case, but indeed, to show that the reasons were not pretextual.

When the appeals court required the Employer on remand to demonstrate additional legitimate, nondiscriminatory reasons, it then imposed a preponderance test on the legitimate reasons already given. The result is a burden of proof in direct conflict with this Court's decisions and decisions of other circuits. Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981); Bauer v. Bailar, 647 F.2d 1037 (10th Cir. 1981); and St. Peter v. Secretary of the Army, 4 Empl. Prac. Guide, (CCH), (26 Empl. Prac. Dec.) ¶ 31, 943, at 21, 230 (D.C. Cir. July 1, 1981).

The appeals court has now re-imposed the preponderance of the evidence rule on the Employer's articulation of its legitimate reasons while

saying that it has not. The effect is the same--the Employer must not only articulate and defend its reasons for not hiring, but further prove by a preponderance of the evidence that its reasons were not pretextual or otherwise discriminatory.

The burden of proof in a Title VII case was first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), subsequently refined in Furnco Construction Corp. v. Green, 438 U.S. 567 (1978), and most recently clearly delineated in Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981). That rule clearly obligates the Plaintiff to prove by a preponderance of the evidence that the basis of the Employer's rejection decision was dis-

criminatory. The Employer does not have the burden of proving its legitimate business reasons by a preponderance of the evidence. This distinction is critical and controlling.

In the instant case, the panel recited the Burdine principle but then reverted to requiring the Employer to prove that the Plaintiff remained in active status when the two physicians were finally hired in September of 1976. This is evident by the panel's statement that "[t]here is simply no evidence to support . . . " the district court's finding that the Plaintiff was no longer actively in the running for employment at that time. 646 F.2d at 989. On the contrary, there was evidence to show Plaintiff's nonavailability. The

appeals court, unlike the trial court, chose not to consider it as persuasive enough to rebut the prima facie case. It should have considered only whether this evidence raised a genuine issue of fact.

In addition to erroneously reapplying the pre-Burdine standard to this case, the appeals court further erroneously expanded Title VII remedies to include nominal damages and attorney's fees, even where the Employer has prevailed by showing that the Plaintiff was rejected in favor of someone more qualified.

> "If on remand the district court determines that Dr. Joshi's gender was a factor in the defendant's failure to consider her application but that she would not have been hired in any event because those chosen were thought to be, for any nondis-

criminatory reason, better suited for the position, Dr. Joshi would not be entitled to back pay; however, the trial court should consider whether she might be entitled to other relief, if only nominal damages, which would carry with it attorney's fees." 646 F.2d at 991, n.33.

The remedies available to Plaintiff under Title VII are as follows:

" (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate."
42 U.S.C. 2000e-5

Clearly the appeals court's instructions to have the district judge

consider awarding nominal damages is completely without authority.

The Defendants (Employer) are instrumentalities of the state or state employees sued in their official capacities. As such, the state is entitled to Eleventh Amendment immunity against which even a nominal monetary judgment would be barred since any judgment would be paid from the coffers of the state. Alabama v. Pugh, 438 U.S. 781 (1978); Sessions v. Rusk State Hospital, 648 F.2d 1066 (5th Cir. 1981).

Insofar as the opinion at issue authorizes an award of nominal damages, the appeals court is without jurisdiction under the doctrine of sovereign immunity to direct entry of any such order. Suits for money damages against

an unconsenting state are barred by the Eleventh Amendment. This principle also applies when the state is the real party in interest. Edelman v. Jordan, 415 U.S. 651 (1974).

The fact that Congress has broad power when it acts to enforce the Fourteenth Amendment does not nullify a state's immunity under the Eleventh Amendment, or its power and authority, unless there is clear language to show that Congress intended that a state's power be swept away. Compare: Quern v. Jordan, 440 U.S. 332, 340-345 (1979), and National League of Cities v. Usery, 426 U.S. 833 (1979), with Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and Hutto v. Finney, 437 U.S. 678 (1978).

The language of Title VII clearly precludes the remedy proposed.

Likewise this opinion is in direct conflict with Northwest Airlines Inc. v. Transport Workers Union of America, 49 U.S.L.W. 4383 (April 20, 1981). In stating the law on providing remedies not expressly provided by statute, this Court held clearly that:

> "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. Both the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are such statutes. The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs . . . . whatever may be a federal court's power to fashion remedies in other areas of the law, we are satisfied that it would be improper for us

> to add a right to contribution to the statutory rights that Congress created in the Equal Pay Act and Title VII."
> 49 U.S.L.W. 4383, 4389

The subject opinion attempting to enlarge the relief awardable in a Title VII claim is erroneous.

Each and every remedy which Congress created under Title VII is an equitable remedy. Damages are a remedy at law and are nowhere mentioned among the remedies so created. Therefore, Plaintiff is no more entitled to damages than an airline had a right to contribution in Northwest Airlines Inc. v. Transport Workers Union of America, 49 U.S.L.W. 4383 (April 20, 1981). This is especially true if damages are to be considered after the trial court has determined that others were hired instead of Plaintiff for

nondiscriminatory reasons.

Further, attorneys fees cannot be given in such a case where Defendant has shown nondiscriminatory reasons for not hiring Plaintiff.

Only a prevailing party is entitled to attorney's fees under the statute:

> " (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person. Pub.L. 88-352, Title VII, Sec. 706, July 2, 1964, 78 Stat. 259; Pub. L. 92-261, Sec. 4, Mar. 24, 1972, 86 Stat. 104." 42 U.S.C. Sec. 2000e-5.

Finally, the appeals court's reliance on Gillin v. Federal Paper Board Co., Inc., 479 F.2d 97 (2d Cir. 1973) and Saracini v. Missouri Pacific Railroad Co., 431 F.Supp. 389 (E.D. Ark. W.D.

1977) is completely misplaced. Both of these cases were decided prior to Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) and Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981). In fact, Gillin was decided prior to McDonnell Douglas v. Green, 411 U.S. 792 (1973) and prior to the 1972 amendments to Title VII.

Further, in Gillin and Saracini the violation of Title VII was established independently of any consideration of the relative qualifications of the plaintiffs and those actually hired.

To the contrary in the instant case, the district court has made a finding that sex was not a factor in the employment decision.

To rely on these cases to fashion a remedy not provided by Title VII and to impose damages and attorney's fees on an employer that has been found to be free of discrimination is patently erroneous.

Finally, the appeals court's rejection of the Employer's statistical evidence is likewise contrary to Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The appeals court is again seeking to impose the preponderance of evidence rule on the Employer. The language the court uses in rejecting the statistical evidence is significant:

> "32. The trial court seems to have been persuaded by defendant's good track record in hiring women and minorities which showed that, during the time period in question, defendants employed greater proportions of women and minorities than were available in the labor

> market. The district court found that the Health Center, which maintains a staff of approximately 10 doctors, has employed a Filipino woman, a black woman, a white woman, an Indian male and a black male as staff physicians. While such statistical evidence might be relevant to negate an inference of discriminatory motive, it is insufficient to rebut the prima facie case of a specific individual in a disparate treatment case. See Cross v. United States Postal Service, 639 F.2d 409 (1981)." 646 F.2d 981, 990.

In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), this Court required the court of appeals to give consideration to the employer's proferred statistical proof in determining whether the employer's actions were discriminatorily motivated.

> "Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided.

> We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated. Thus, although we agree with the Court of Appeals that in this case such proof neither was nor could have been sufficient to conclusively demonstrate that Furnco's actions were not discriminatorily motivated, the District Court was entitled to consider the racial mix of the work force when trying to make the determination as to motivation." 438 U.S. at 580

By summarily rejecting the trial court's consideration of the Employer's statistical evidence, the appeals court has not only reverted to the preponderance requirement, but relied on Cross v. United States Postal Service, 639 F.2d 409 (8th Cir. 1981), which itself is erroneous. The Cross court relied on Burdine v. Texas Department of Community

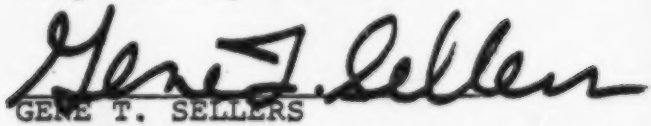
Affairs, 608 F.2d 563 (5th Cir. 1979) and Turner v. Texas Instruments, 555 F.2d 563 (5th Cir. 1977), the holdings of which have been nullified by this Court.

The statistical evidence was not relied on by the trial court to conclusively demonstrate that the Employer's action was not discriminatorily motivated. Rather, these unrefuted statistics were only one piece of evidence raising a genuine issue of fact as to any discrimination. The appeals court is now requiring that the statistical evidence either rebut the prima facie case or it must be rejected. This is error.

CONCLUSION

The writ should be granted.

Respectfully submitted,



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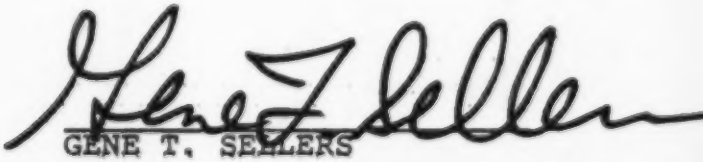
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix were mailed to ALGIA R. COOPER, Knowles, Randolph & Cooper, 121 1/2 South Monroe Street, Tallahassee, Florida 32301, and STEPHEN LINDSEY GORMAN, Gorman & Matthew, Post Office Box 1754, Tallahassee, Florida, this 14th day of September, 1981.



GENE T. SELLERS

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Dr. Anjali A. JOSHI,

Plaintiff-Appellant,

v.

FLORIDA STATE UNIVERSITY et al., Defendants-Appellees.

No. 80-5200.

United States Court of Appeals,

Fifth Circuit.

Unit B

June 1, 1981.

Appeal from the United States District Court for the Northern District of Florida.

Before TUTTLE, RONEY and VANCE, Circuit Judges.

TUTTLE, Circuit Judge:

Appellant, Dr. Anjali A. Joshi, appeals from dismissal of her employment discrimination suit under Title VII[1] in which she alleged that defendants[2] had discriminated against her on the basis of her sex, religion and national origin when they failed to

1. 42 U.S.C. §2000e et seq.

2. Defendants named in the Complaint were: Florida State University (FSU); Bernard Sliger, in his capacity as President of FSU; Dr. Homer Coten, in his capacity as Director of Business Affairs; Dr. Robert Hunter, in his capacity as former Director of FSU Health Center; Dr. Philip Rond, as Director of the FSU Health Center.

offer her a position as staff physician at the Florida State University Health Center.

I. Facts

Appellant is a female physician, born and educated in India. In February 1974, she spoke with Dr. Robert Hunter, then director of the Florida State University Health Center, about employment as a staff physician. Dr. Hunter questioned her regarding her qualifications and gave her information about the operation of the Health Center. He then showed her around the Center and introduced her to several of the physicians employed there.[3] Dr. Joshi did not make a formal application at that time for two reasons: She did not have as yet a

3. Plaintiff testified that she met several physicians working at the Health Center. Dr. Hunter's notes from the interview, which were admitted into evidence, indicate that she saw Drs. Go and Gagliano.

license to practice medicine in the United States, and she felt that caring for her two small children would preclude her from taking the required call duty. Dr. Hunter told her she should stay in touch with them.

In August, 1974, Dr. Joshi obtained her Florida medical license and so notified Dr. Hunter. However, Dr. Joshi did not make a formal application for a position as staff physician until August of 1975 when she finally felt she would be able to accept call duty.

During the middle of that month, she was interviewed by Dr. Hunter. According to his usual procedure, he conducted her through the medical center and introduced her to several physicians with whom she had brief interviews.[4]

4. The physicians who met with an applicant during the tour through the hospital were apparently selected at random, depending upon

Following the tour, Hunter polled the physicians who had met Dr. Joshi. None had any objections to her personality or attitude. To this input from the staff physicians who would be working with Dr. Joshi, Dr. Hunter added his own evaluation of her written application.[5]

Dr. Hunter found Dr. Joshi to be fully qualified for employment as a staff physician, but he needed written authorization from Dr. Homer Ooten, the university administrator with primary

who was available at the time.

5. There is no evidence that Dr. Hunter received written recommendations from the physicians who met with Dr. Joshi. She sent a letter dated June 13, 1975, with which she enclosed copies of her medical certificates, her Florida license and references. Dr. Hunter testified that he considered this letter to be her formal application for employment. Outside of his notes on the interview, Dr. Hunter apparently never prepared a written evaluation of the applicant.

fiscal responsibility for the Health Center, before he could fill any position at the Center. On August 18, 1975, he submitted her name, along with the names of five other applicants he had found to be qualified, in a memorandum to Dr. Ooten requesting authorization to hire the six doctors. Dr. Hunter recommended the doctors in the order in which each had made a firm commitment to accept the appointment.[6] Dr. Ooten approved the hiring of the first four on the list. As Dr. Joshi's name was fifth on the list, she was not hired.

6. The physicians listed in order of priority were: Drs. Donald Treger (white, male); Spurgeon McWilliams (black, male); Yolande Mason (black, female); Eugene Tubbs (white, male); Joshi; and Thomas Dale (white, male). Dr. Hunter testified that Dr. Dale had actually withdrawn his application before this memo was sent to Dr. Ooten.

On August 21, 1975, Dr. Hunter wrote Dr. Joshi to inform her that he had not received approval to hire her.[7] He stated that she was "next on the list and [would] have the first opportunity for the next position that opens." On January 8, 1976, Dr. Hunter sent a memorandum to Dr. Ooten in which he requested authorization to hire Dr. Joshi "at the earliest possible date" since the medical center was understaffed and Dr. Joshi was next in line for employment in terms of qualifications and priority.[8]

7. Dr. Hunter did not indicate to Dr. Joshi why approval had been given only for four physicians, but he said simply that those four had priority based on having made commitments to come to work sooner than she had.

8. Dr. Hunter understood that funds were available for the hiring of a new physician. In a memo to Dr. Ooten dated January 8, 1976, he stated: "At present we have 10 FTE physicians out of an authorized 15. The minimum with which we could do a responsible job is 12. Our budget for the current fiscal year is based

Dr. Ooten replied by memorandum dated January 19, 1976. He stated that he was concerned about the small number of physicians on the staff but that he felt that the fact that Dr. Joshi was next in line in terms of the date on which she had made a firm commitment to accept employment was insufficient justification for hiring her.[9] He stated that he did not feel that a commitment had been made to Dr. Joshi despite the implications of Dr. Hunter's letter to her on August 21, 1975. He requested Dr. Hunter to arrange for a select group of staff physicians to

on 12 FTE physicians."

9. Oddly, Ooten had not objected to the "earliest postmark" method of differentiating among the applicants recommended as qualified by Dr. Hunter on August 18 when he said he felt constrained by budgetary reasons to limit his authorization to four of the six applicants listed.

interview Dr. Joshi and forward their comments regarding her to him by way of a written recommendation.[10]

On January 22, 1976, Dr. Joshi met with this committee. The next day, Dr. McHugh, who had chaired the committee, submitted a written report of the interview to Dr. Ooten. He stated therein that the committee had questioned Dr. Joshi about her past medical experience and reached the conclusion that she appeared well qualified for the position. However, he concluded with the statement that he felt the vacancies should be advertised to determine the availability of physicians prior to hiring any staff physicians. Ooten

10. The committee members designated by Ooten were Drs. Gagliano, Go, McHugh, Steele and Treger. Dr. Hunter added Dr. Mason to the 15 and requested Dr. McHugh to chair the committee.

testified that he called a meeting of the committee members on February 20, 1976, in order to clarify the meaning of this report since it contained no clear recommendation either to hire or not to hire Dr. Joshi. He testified that he learned that some of the physicians had reservations about Dr. Joshi's qualifications.[11] Meanwhile, however, many things were happening at the Health Center.

Dr. Hunter had served as director of the Health Center since April, 1970. On February 11, 1975, he had sent a letter to Stanley Marshall, then President of Florida State University, in which he requested permission to step down

11. Specifically, Dr. Go testified that she was concerned that Dr. Joshi might not have the expertise in gynecology which was the area in which the Health Center was especially shorthanded.

from the position of director effective August 31, 1975, or earlier. No action had been taken on the request, and on January 23, 1976, the same day that the physician's committee made the report on Dr. Joshi referred to above, Dr. Hunter wrote to Dr. Ooten asking permission to relinquish the director's position effective January 31, 1976. This time Dr. Hunter's request was honored, and Dr. Philip Rond became acting director on or about February 1, 1976. Dr. Hunter testified that he assumed the position of staff physician, apparently the position to which Dr. Joshi aspired, on January 31, 1976.[12]

12. Dr. Ooten did not dispute the fact that Dr. Hunter began to serve as a university physician at the end of January, but he was careful to specify that Dr. Hunter was merely in an "acting capacity" as staff physician until the middle of March.

In early February, 1976, Dr. Joshi telephoned Dr. Hunter to find out what had been the result of her interview. Dr. Hunter told her that he was no longer the director and that she should contact Dr. Ooten. Dr. Joshi testified that she tried to reach Dr. Ooten but that he failed to return her call. Still anxious to learn the results of her interview, she telephoned Dr. Yolande Mason, a black female physician who had been present at the interview, who told Dr. Joshi that she would see what she could find out.[13] Dr. Joshi then telephoned Dr. Ooten's supervisor, Dr. Stephen McClelland, who told her that

13. Dr. Mason was unsuccessful in reaching Dr. Ooten on February 6, when she called to find out what was the status of Dr. Joshi's application. On February 9, 1976, she received a memo from Dr. Ooten in which he strongly rebuked her for attempting to find out why Dr. Ooten had not returned Dr. Joshi's telephone call.

he would look into the matter. Dr. Joshi testified that shortly thereafter, Dr. Ooten called her and told her there was no vacancy. Dr. Joshi testified that she then phoned Jim Vickery in the Vice Chancellor's office of the Board of Regents who told her he would see what the problem was. Dr. Joshi also contacted Dr. Freddie Groomes, an assistant to the president of FSU with primary responsibility for developing the University's affirmative action programs.[14]

14. In an affidavit prepared in response to Dr. Joshi's charge of employment discrimination, Dr. Groomes stated that she contacted Dr. Ooten and Dr. McClelland after her conversation with Dr. Joshi and cautioned them to treat Dr. Joshi fairly and to consider only job related characteristics in determining her qualifications. She also stated that she later received an inquiry from James Vickery who suggested that someone keep Dr. Joshi advised of relevant matters concerning her interest in employment at the Center. She stated that she then phoned Dr. Ooten and reminded him of the need to communicate further with Dr. Joshi.

On February 26, 1976, Dr. Eugene Tubbs, a staff physician at the Health Center, resigned creating a vacancy. On February 27, Dr. Ooten phoned Dr. Joshi and told her there was a vacancy for which they were going to advertise in the professional journals. That same day, Dr. Ooten wrote Dr. Joshi a letter to inform her that she was being considered for the position of staff physician.[15] From March 11, 1976, through March 20, 1976, a staff physician position was posted as vacant in accordance with state personnel rules.

On March 16, 1976, Dr. Rond sent a memorandum to Dr. McHugh requesting him

15. Dr. Ooten stated that he was required to post the vacancy for two weeks and that he would then receive recommendations from the screening committee and appoint the successful candidate. The trial court found that these proceedings were "probably pretextual" in that Dr. Hunter, a valued longtime employee, was probably assured of the job before any interviewing occurred.

to re-establish the Physician's Selection Committee[16] to prepare a recommendation for the general physician choice. The committee report dated March 17, 1976, contained three recommendations: First, they recommended that Dr. Hunter be placed in the category of Staff Physician. Secondly, they recommended that Dr. Joshi's application be "tabled until the results of the advertisement have produced, or failed to produce, further applications." Finally, the committee recommended that the Health Center make an effort to employ at least two more full time physicians.

On March 19, 1976, Dr. Ooten wrote to Dr. Joshi to inform her that the

16. Dr. Rond apparently considered the Physicians Selection Committee to be composed of only Drs. McHugh, Go, Steele and Gagliano. However, the selection committee which actually met was composed of only Drs. McHugh, Steele and Gagliano.

position for which she was being considered was to be filled by Dr. Robert Hunter. He stated that her qualifications were impressive but that the committee had "recommended the qualifications of the person selected over those of yourself."[17] On April 2, 1976, Dr. Joshi filed charges of discrimination with the Equal Employment Opportunity Commission.

On April 23, 1976, another staff physician, Dr. Treger, resigned, creating another vacancy at the Health Center. During the spring and summer of 1976, acting director Rond sought applications for physicians at the Health Center. Although he advertised

17. The formal committee report signed by Dr. McHugh made no mention of the qualifications of either Dr. Hunter or Dr. Joshi. It just stated: "It was the unanimous opinion of the committee that Dr. Hunter should be placed in the new category as staff physician."

and actively recruited certain physicians,[18] he made no effort to contact Dr. Joshi to notify her of the need for additional physicians at the Center.

On June 11, 1976, the Physicians Screening Committee[19] met to review the curricula vitae on hand of doctors who had written to date about employment in order to choose one for employment in the immediate future. The committee recommended that a position be offered to Dr. Charles Freeble, III, and that interviews be set up with three additional applicants. Dr. Joshi's name was

18. On March 5, Dr. Rond notified Dr. Dale, the individual who had been sixth on the list submitted by Dr. Hunter in August, 1975, that there was a vacancy at the Center for which he could be considered. Dr. Rond also wrote to Dr. Charles Freeble, III, and Dr. William Burk encouraging them to accept offers of employment at the Health Center.

19. The committee by this time was only Drs. McHugh, Steele and Gagliano.

not mentioned. Dr. Freeble turned down the offer on July 19, 1976.

On July 25, 1976, an advertisement announcing the association of Dr. Joshi with Dr. Edward Clark in the practice of family medicine in Medart, Wakulla County, Florida, appeared in the Tallahassee Democrat. Dr. Joshi, however, testifed that she never withdrew her application from the university despite this association.

In September of 1976, acting Director Rond hired two new physicians. One, Dr. Latey, was an Indian male, educated in India and certified in surgery by the Royal College of Physicians in Edinburgh, Scotland. The other, Dr. Heller, was a white male who was board certified and had 22 years of experience in the practice of family medicine. A year later,

the Health Center employed Dr. Virginia Gillian, a white female who had worked temporarily at the Health Center from March 7, 1977, to June 23, 1977.

On June 14, 1978, Dr. Joshi filed suit in the United States District Court for the Northern District of Florida seeking damages and injunctive relief for the defendant's alleged violation of Title VII. The district court determined that she had made out a prima facie case of employment discrimination but that the defendants had successfully shown legitimate reasons for their failure to hire the plaintiff. The court concluded that the plaintiff had failed to show that the reasons given by defendant were a pretext for discrimination and that the plaintiff had failed to meet the ultimate burden of persuasion

by a preponderance of the evidence that she had been discriminated against on the basis of her sex. The court, therefore, entered judgment in favor of defendants, 486 F.Supp. 86.

II. Standard of review

Although discrimination vel non is essentially a question of fact, the trial court's finding of nondiscrimination is a resolution of the ultimate issue in this case. We, therefore, are not bound by the clearly erroneous standard in reviewing that finding, but must make an independent determination of appellant's allegations of discrimination. We are bound, however, by the district court's credibility determinations and findings of subsidiary fact which are not clearly erroneous. Phillips v.

Joint Legislative Committee on Performance and Expenditure Review of the State of Mississippi, 637 F.2d 1014 (5th Cir. 1981); East v. Romine, 518 F.2d 332, 338-39 (5th Cir. 1975); Causey v. Ford Motor Co., 516 F.2d 416, 420-21 (5th Cir. 1975).

III. Disparate Treatment Allegations

[1] To establish a prima facie case of employment discrimination an individual Title VII plaintiff must prove (1) that he or she belongs to a class protected by the statute; (2) that he or she was seeking and was qualified for a job for which the employer was seeking applicants; (3) that, despite the fact that he or she was qualified, the individual was not selected by the employer; and (4) that after such rejection, the position remained open and

the employer continued to seek applications from persons of complainant's qualifications. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the failure to hire the plaintiff." Texas Department of Community Affairs v. Burdine, ___U.S.___, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).[20] The plaintiff must then be given an opportunity to prove by a preponderance of

20. The nature and extent of the defendant's burden of proof in explaining its actions was the subject of great debate following the McDonnell Douglas opinion. See Sweeney v. Board of Trustees, 569 F.2d 169, 177 (1st Cir.), vacated and remanded for reconsideration per curiam, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). See generally, Friedman, The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique, 65 Cornell L.Rev. 1, 3-11 (1979). This circuit had consistently held that the employer bears the burden of showing a legitimate reason by a preponderance of the evidence. See Phillips v.

the evidence that the proffered justification is merely a pretext for discrimination. Id. 101 S.Ct. at 1094-1095. Furnco Construction Co. v. Waters, 438 U.S. 567, 578, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978). The ultimate burden of persuasion by a preponderance of the evidence rests on the plaintiff. Jepsen v. Fla. Bd. of Regents, 610 F.2d 1379, 1382 (5th Cir. 1980).

The trial court found that Dr. Joshi had made out at least the general requirements of a prima facie case under McDonnell Douglas.[21] The trial court

Joint Legislative Committee, supra, 637 F.2d at 1027 n. 22; Burdine v. Texas Department of Community Affairs, 608 F.2d 563 (5th Cir. 1979). The Supreme Court, however, reversing this court in the Burdine case held that: "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." 101 S.Ct. 1096.

21. The district court noted, however, that there was some question as to the sufficiency of her qualifications for the job. But see note 28 infra.

determined, however, that the defendants had met their burden of showing that the decision not to hire Dr. Joshi was based on legitimate reasons that had nothing to do with her national origin or her sex and that the plaintiff had failed to show that the reasons given were pretextual.

The trial court found that Dr. Joshi's complaint of employment discrimination could be broken down into three separate situations: First, in August, 1975, when her name was fifth on the list of those recommended; secondly, from August, 1975, until January, 1976, when Dr. Hunter continued to press Dr. Ooten for his authorization to hire Dr. Joshi; and third, in March, 1976, when Dr. Hunter had resigned as director and was being interviewed along with the

plaintiff for a staff physician position. Finally, the trial court found that the plaintiff was no longer actively in the running for employment at the Health Center in September of 1976, when the next hiring of new doctors took place.

[2] With regard to the first instance, the district court found that Dr. Joshi had not been hired because the University was implementing an austerity program, had put a freeze on hiring and had targeted the Health Center as a special budgetary problem. There is sufficient evidence in the record to support the finding that these budgetary constraints were responsible for Dr. Ooten's authorization to hire only the first four doctors on the list of six proposed by Dr. Hunter. We, therefore, affirm the finding of nondiscrimination in this initial failure to hire the plaintiff.

[3] As to the second instance, the district court found that the plaintiff was the victim of continuing budgetary problems as well as a power struggle between Dr. Hunter and Dr. Ooten over the number of staff physicians to be allowed at the Health Center and the manner in which these physicians should be selected. In response to Dr. Joshi's allegation of discriminatory treatment based on the fact that she had had to undergo further interviews after having been approved for hire, the district court found that the formation of the committee was due merely to Dr. Ooten's efforts to accommodate the desire of staff physicians to have more input in the hiring process and the need for screening committees under affirmative action mandates. The trial court found further that the implications

from Dr. Hunter's testimony that Dr. Joshi was the only physician he had ever recommended whose recommendation had been rejected were unpersuasive in light of the fact that budgetary constraints were beginning to be felt at just about the time the plaintiff was being considered for employment and that Dr. Hunter's complete control over hiring was unacceptable to several members of the Health Center staff.

Much evidence in the record makes us suspicious of the fact that Dr. Ooten decided to set up a formal screening committee to interview the plaintiff and review her application after she had already been ranked as qualified equally with five other applicants except in terms of the dates in which each had made a firm commitment to accept employ-

ment at the Health Center. For example, Dr. Ooten based his decision to authorize the hiring of the first four from this list solely on the availability of funds and the respective commitment dates of the applicants without questioning this practice. Additionally, Dr. Ooten testified that he was not competent to judge the qualifications of physicians[22] and there is no evidence to support the conclusion that he had been given any reason to question Dr. Joshi's qualifications before he requested that she be interviewed by the screening committee.[23] Moreover, although the pattern of having the "Physicians Selection Committee" meet

22. Dr. Ooten was not a medical doctor. He appears to be a doctor of business administration.

23. In his January 18, 1976, memo to Dr. Hunter, Dr. Ooten stated merely "It strikes me that I should have input from the fulltime medical staff that will be working with the new physicians."

with applicants continued in form, subsequent applicants apparently saw fewer physicians.[24]

Nevertheless, we refrain from reversing the lower court's finding of nondiscrimination in this second instance. We cannot say that the district court's findings of subsidiary fact are clearly erroneous, and evidence in the record supports the finding that the initiation of the screening process was not necessarily a discriminatory tactic aimed solely at Dr. Joshi. Additionally, there is some question as to whether there were funds available to hire any physicians during this period, as no physicians were

24. Dr. Mason was apparently only on the committee on January 23 when it met to interview Dr. Joshi. Dr. Go, the only other woman on the committee, was not present at either the March 17 meeting or the June 11 meeting. Compare notes 10, 16 and 18, supra.

hired at this time.[25] We conclude, therefore, that the district court did not err by finding that defendants did not act impermissibly in their failure to hire the plaintiff during this period.

With respect to the third instance, designated by the trial court as the point at which the decision was made to employ Dr. Hunter rather than Dr. Joshi, we are troubled by several facts. Defendants presented evidence to show that Dr. Hunter was chosen to fill the vacancy created by Dr. Tubbs who resigned in February, 1976, and that Dr. Hunter knew that he would have to submit to review

25. Dr. McHugh's recommendation on January 23 that "the vacancies be advertised . . ." would seem to indicate that there was already a vacancy for which the Center was seeking a physician at the time Dr. Joshi was interviewed, and Dr. Hunter was of the impression that funds were available throughout this period; however, the first vacancy which clearly occurred was in February when Dr. Tubbs resigned.

by a screening committee before being authorized to fill a position as staff physician. However, there is evidence in the record which suggests that authorization of additional funds was not necessary for Dr. Hunter to assume the role of staff physician even if approval by a screening committee was required before he could "step down." In Dr. Hunter's memo to Dr. Ooten dated August 18, 1975, in which Dr. Hunter requested authorization to hire six physicians, the names of Dr. Hunter and Dr. Rond were included with Drs. Ferrell, Gagliano, Go, McHugh, Steele, Jones and Taylor on a list comprising the FTE physicians employed at the Health Center at that time. Thus it appears that, as far as funding was concerned, the administration did not differentiate between the positions

of director and staff physician. Moreover, one of the exhibits presented by defendants at trial was a memo dated September 9, 1977, to the University attorney from the administrator of the University Health Center, purporting to list all physicians employed at the Center since January 1, 1976.[26] Listed are Drs. Latey and Heller who were hired on September 20, 1976, and Dr. Virginia Gillian who was hired during 1977. Curiously absent is the name of Dr. Hunter who was supposedly hired rather than the plaintiff during March, 1976.[27] As a final point, Dr. Hunter

26. Defendants presented this exhibit in an effort to substantiate their claim that they hired large percentages of women and minorities.

27. Additionally, we find inherently suspect the fact that Dr. Mason, a black female physician who had made some efforts to intervene on behalf of the plaintiff, was told specifically by Dr. Rond not to tell Dr. Joshi that Dr. Tubbs was resigning.

testified that he assumed a position as staff physician January 31, 1976, that he did not know he was being considered by a screening committee during March, 1976, and that he did not understand how he had come into competition with Dr. Joshi for the position when he had full qualifications as a specialist in internal medicine, had spent six years as director and had only shifted from "one legislative line to another in the same grade [when there were] existing position vacancies." [Emphasis added.]

It seems quite possible, therefore, that Dr. Joshi could have been hired to fill the vacancy created when Dr. Tubbs resigned without affecting Dr. Hunter's ability to drop into a position of staff physician. We refrain, however, from basing a reversal of the lower court's

finding of nondiscrimination on this third instance because the record is not clear with regard to how many staff physicians were being sought at each time in question, and there is evidence in the record which supports the trial court's determination that Drs. Hunter and Joshi were competing for one sole vacancy and that Dr. Hunter was selected because of his long service as Director.

[4] We base our reversal on the district court's erroneous determination that the plaintiff was not discriminated against when Drs. Heller and Latey were hired because she was no longer actively in the running for employment at the Health Center at that time. There is simply no evidence to support this conclusion.

The district court apparently based its finding that Dr. Joshi was no longer

actively in the running for employment on the fact that Dr. Joshi had placed a notice in the Tallahassee Democrat advertising her association with another doctor in the practice of family medicine.[28] The fact that this ad appeared in the paper, however, is insufficient to support a finding that the defendants did not consider Dr. Joshi's application because they believed that she was employed elsewhere and, therefore, was no longer interested in employment as a staff physician at the Health Center. Only one defendant, Dr. Rond, testified that he had seen the ad, and he testified

28. The district court also referred to the fact that the committee which had recommended that Dr. Hunter be hired had also recommended that Dr. Joshi's application be "tabled." However, this report did not indicate that Dr. Joshi's name should be dropped from consideration but merely that her application should be held in abeyance until further advertising had produced, or failed to produce, a wider pool of applicants.

on cross-examination that it had no significance for him and that, as far as he knew, she was still interested in employment. Moreover, the ad did not appear in the newspaper until July, 1976, and, therefore, can not even be considered as an explanation for the defendants' failure to consider Dr. Joshi's application at the June 11, 1976, meeting of the physicians screening committee to review the applications then on file.[29]

The evidence overwhelmingly supports the conclusion that Dr. Joshi remained actively in the running for employment at the Health Center during the time period after she was notified that Dr. Hunter had been selected to fill a position as staff physician. As we stated above, the screening committee recommended that her application be "tabled"

29. See note 18 supra.

not "dropped," and Dr. Joshi testified that she did not withdraw her name. The letter from Dr. Ooten to Dr. Joshi informing her that Dr. Hunter had been selected did not tell her that she would have to resubmit her application to be considered for future vacancies, and Dr. Joshi had already been considered at least twice after having made only one formal application. Moreover, the record contains an affidavit prepared June 3, 1976, by Dr. Groomes in response to the charge of employment discrimination by Dr. Joshi in which Dr. Groomes stated, inter alia, "I have discussed [Dr. Joshi's] interest in employment with appropriate University officials and have reaffirmed with them that her application be considered fairly and that she continue to be advised regarding her

status as a candidate for any vacancies which might occur at the University Health Center." Most significant as to this issue is the statement made on the defendant's behalf by their counsel in replying to Dr. Joshi's EEOC charge. This statement is: "At the time she filed this charge (April 8, 1976) she was eligible for consideration for vacancies at the University Health Center. She would be considered for future vacancies should they occur." [Emphasis added.] This statement belies the contention that when Dr. Freeble was offered a position after June 11, 1976, Dr. Joshi was no longer a candidate for the opening. The same is true with respect to the employment of two doctors in September, 1976.

A similar case was recently decided

by this Court. In Phillips v. Joint Legislative Committee, 5 Cir., 637 F.2d 1014, 1027-28 (1981), we reversed the district court's finding that the defendant's failure to hire a black female applicant was based on a legitimate belief that she was already employed. The trial court had accepted the defendant's explanation that the plaintiff would have been hired had newspaper and television reports not indicated to them that she was already employed. The court found that the plaintiff failed to show that the reason given was a pretext. In reversing we stated:

> We do not mean to say that Title VII always requires an employer to pursue black applicants even after they are hired elsewhere. We hold only that, on the record in this case, we cannot avoid the conclusion that the reason offered was a convenient way out of an uncomfortable decision--in other words, a pretext.

At 1028. Likewise, we conclude that the fact that Dr. Joshi announced in July, 1976, her association with another doctor fails to constitute a legitimate reason for their refusal to consider Dr. Joshi[30] as an applicant for a position of staff physician.

Thus, contrary to the district court's determination, we find that she was actively in the running for a position as staff physician during the time period following receipt of her last letter from Dr. Ooten. In light of this finding, we conclude that Dr. Joshi made out a prima facie case of employment discrimination in this final instance

30. One wonders what the trial court would have expected her to do while waiting around for budget conditions (the only bar to her being hired originally) to permit her to be hired. We would not expect her to sit idly by instead of engaging in a medical practice until notified finally of the outcome of her request for employment by the defendants.

under the McDonnell Douglas standards and that the defendants have as yet failed to show a legitimate reason for their failure to hire her. She is a woman and thus a member of a class protected by Title VII. She had applied, and was qualified[31] for a position for which the Health Center was actively recruiting applicants. The defendants made offers of employment to at least four male physicians during the period in question and ultimately

31. The trial court indicated that she might not be qualified for the job; however, there is no foundation for this conclusion. She was initially found to be qualified and recommended by Dr. Hunter by the procedure then practiced at the Health Center. She then, at Dr. Ooten's insistence, interviewed with a group of physicians who stated that they found her to be "well-qualified for the position." Her qualifications were admittedly considered sufficient to place her in the running against Dr. Hunter and in notifying her that Dr. Hunter had been selected, Dr. Ooten stated "your qualifications were impressive . . ." Additionally, in her affidavit Dr. Groomes stated "it was determined upon the basis of my conversation with Dr. Ooten that . . . she was not unqualified for any position as a staff physician."

hired two men to fill positions for which Dr. Joshi was qualified.

Since the trial court found that Dr. Joshi was no longer in the running for employment following Dr. Hunter's being placed in a position as staff physician, the trial court did not reach the question of whether the defendants met their burden under Burdine as to this final time period.[32] On remand, the district court must determine whether the defendants produced or are now able to

32. The trial court seems to have been persuaded by defendant's good track record in hiring women and minorities which showed that, during the time period in question, defendants employed greater proportions of women and minorities than were available in the labor market. The district court found that the Health Center, which maintains a staff of approximately 10 doctors, has employed a Filipino woman, a black woman, a white woman, an Indian male and a black male as staff physicians. While such statistical evidence might be relevant to negate an inference of discriminatory motive, it is insufficient to rebut the prima facie case of a specific individual in a disparate treatment case. See Cross v. United States Postal Service, 639 F.2d 409 (1981).

offer evidence of a legitimate, nondiscriminatory reason explaining their failure to hire Dr. Joshi and produced evidence that those ultimately chosen had qualifications equal to those of the plaintiff. Burdine, supra. See Panlilio v. Dallas Independent School District, 643 F.2d 315 (5th Cir. 1981). If the trial court determines that the defendants have met or are able to meet this burden, the plaintiff must then have an opportunity "to demonstrate that the proffered reason was not the true reason for the employment decisions." Burdine, supra, 101 S.Ct. at 1095.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.[33]

33. If on remand the district court determines that Dr. Joshi's gender was a factor in the defendant's failure to consider her application

REVERSED and REMANDED.

but that she would not have been hired in any event because those chosen were thought to be, for any nondiscriminatory reason, better suited for the position, Dr. Joshi would not be entitled to back pay; however, the trial court should consider whether she might be entitled to other relief, if only nominal damages, which would carry with it attorneys fees. See Gillian v. Federal Paper Board Co., Inc., 479 F.2d 97 (2d Cir. 1973); Saracini v. Missouri Pacific Railroad Co., 431 F.Supp. 389 (E.D. Ark. W.D. 1977).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-5200

DR. ANJALI A. JOSHI,

Plaintiff-Appellant,

versus

FLORIDA STATE UNIVERSITY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 6/1/81, 5 Cir., 198_, __F.2d__).

(July 23, 1981)

Before TUTTLE, RONEY and VANCE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DR. ANJALI A. JOSHI,

Plaintiff,

vs. TCA 78-0844

FLORIDA STATE UNIVERSITY,
et al.,

Defendants.
_____/

MEMORANDUM OF DECISION

Plaintiff, Anjali Joshi, brought this action against Florida State University; the FSU Health Center; Bernard Sliger, President of FSU; Dr. Homer Ooten, Director of Business Affairs; Dr. Robert Hunter, former Director of the FSU Health Center; and Dr. Phillip C. Rond, Director of the FSU Health Center; under 42 U.S.C. §2000e, et seq.,

alleging that the Defendants discriminated against her in their employment practices because of her sex, religion, or national origin. Dr. Joshi is a female physician, born and educated in India. In February, 1974, she spoke with Dr. Robert Hunter, then director of the Health Center, about employment as a university physician. Plaintiff did not make formal application at that time because two factors made her ineligible for employment: having small children, she was unable to take mandatory night and weekend call duty, and she did not have a license to practice in the United States. On August 22, 1974, Plaintiff obtained her Florida medical license.

Almost one year later, about the middle of August, 1975, she informed Dr. Hunter that she was now licensed and

that her children were old enough to permit her to take call duty. Plaintiff was interviewed again by Dr. Hunter and was introduced to a number of the doctors then employed by the Health Center. On August 18, 1975, Dr. Hunter sent a memorandum to Dr. Homer Ooten, the administrator with primary fiscal responsibility for the Health Center, requesting authorization to hire six doctors. The doctors were recommended in the order in which each had made a firm commitment to accept an appointment at the Health Center, and Dr. Joshi's name was fifth on this list. Dr. Ooten approved the hiring of the first four doctors on the list submitted by Dr. Hunter, and Plaintiff was therefore not one of the doctors approved. The doctors hired were a black female, a black male, and two white males.

Between August, 1975, and January, 1976, Dr. Hunter made repeated inquiries to Dr. Ooten about hiring additional doctors, particularly Dr. Joshi, as she was next on the priority list. In response to a January 8, 1976, memorandum from Dr. Hunter recommending that Dr. Joshi be hired at the earliest possible date, Dr. Ooten, on January 19, 1976, wrote:

> I am in sympathy with the current workload and the low number of physicians on board; however, I do not feel that the 'earliest postmark' is sufficient justification for hiring a physician. Although your August 21, 1975, letter to Dr. Joshi implied a commitment, I do not feel that one has been made.
>
> It strikes me that I should have input from the fulltime medical staff that will be working with the new physician. (Plaintiff's Exhibit 7).

The letter goes on to ask that a committee of physicians meet with Dr. Joshi

and then make a written recommendation on her employment. The committee was appointed and met with the Plaintiff; the recommendation they made is ambiguous. The first paragraph states the conclusion that the Plaintiff "appeared well qualified for this position;" but the last paragraph, voicing the opinion of Dr. McHugh, Chairman, states his feeling that before hiring any staff physicians, the vacancies should be advertised in the Journal of the American Medical Association in order to determine the availability of physicians. (Plaintiff's Exhibit 9). Due to the equivocal response of the committee, Dr. Ooten met with the members to get a firsthand interpretation of their recommendation. Both Dr. Ooten and Dr. Go (who was a member of the

committee) testified that the further response of the committee was that the Plaintiff was not sufficiently qualified in clinical experience, particularly gynecology, an area of special need for the Health Center.

Dr. Hunter had served as director of the Health Center since April, 1970. On February 11, 1975, he sent a letter to Stanley Marshall, President of FSU, asking to step down from the position of director effective August 31, 1975, or earlier. (Defendants' Exhibit 10). No action had been taken on this request, and on January 23, 1976, the same day that the physicians' committee made the report on Dr. Joshi referred to above, Dr. Hunter wrote to Dr. Ooten asking permission to relinquish the director's position effective January 31, 1976.

(Defendants' Exhibit 4). This time, Dr. Hunter's request was honored, and Dr. Phillip Rond became acting director on or about February 1, 1976. Although Dr. Hunter wanted to resign as director of the Health Center, he had, from the beginning, asked to stay on as a staff physician (Defendants' Exhibit 10) and had understood that even to "step down" he would have to be screened for employment by a committee. (Defendants' Exhibit 11).

From March 11, 1976, through March 26, 1976, a Staff Physician position was posted as vacant in accordance with state personnel rules. Dr. Ooten informed the Plaintiff by letter that she was being considered for the vacancy. (Plaintiff's Exhibit 11). The physicians' committee met on March

17, 1976, and recommended Dr. Hunter for the position of Staff Physician. Dr. Joshi's application was tabled "until the results of an advertisement in the medical journals have produced, or failed to produce, further applications." (Plaintiff's Exhibit 13).

After the rehiring of Dr. Hunter, Acting Director Dr. Rond continued to seek applications for physicians for the Health Center. On April 2, 1976, Plaintiff filed charges of discrimination with the Equal Employment Opportunity Commission. In September of 1976, Acting Director Dr. Rond hired two new physicians, one a white male with 22 years experience in family practice medicine and the other an Indian male educated in India and certified in surgery by the Royal College of Physicians in Edinborough [sic], Scotland.

Plaintiff in this case is clearly convinced that she has been wronged and has attributed the treatment she received to her status as a foreign-born woman. Based on the evidence presented at trial, this court can only infer that Plaintiff had the misfortune to be caught in the middle of a university political, administrative, and budgetary battle. The evidence shows that Dr. Hunter, who had been director of the Health Center for a considerable length of time, was at odds with Dr. Ooten, the administrator brought in to eliminate Health Center budgetary deficits which were growing larger every year. Dr. Hunter was concerned with delivery of health services, thought the Health Center was understaffed, wanted to hire more doctors immediately, and was well aware of the difficulty in

hiring qualified physicians at the salaries the Health Center could offer. Dr. Ooten, on the other hand, had been given a specific administrative mandate: he was to "turn around" the Health Center and the athletic program and stop the drain these auxillary [sic] services were putting on the budget. Dr. Ooten was apparently also being backed by some Health Center physicians who were dissatisfied with Dr. Hunter as director, particularly with his hiring procedures.

The burden of proof applicable in a Title VII case was detailed by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972). The plaintiff has the initial burden of establishing a prima facie case of discrimination by showing (1) that she be-

longs to a protected minority; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that she was rejected despite her qualifications; and (4) that the position remained open and the employer continued to seek applications from persons of complainant's qualifications. McDonnell at 802. Plaintiff here has made out at least the general requirements of a prima facie case, although some real question exists as to the sufficiency of her qualifications for the position.

Once a prima facie case is shown, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for its actions. McDonnell at 802, 803. Here the Defendants have made a more than adequate showing that

the decision not to hire Dr. Joshi was based on legitimate reasons that had nothing to do with either her national origin or her sex. In 1975, the University was implementing an austerity program, had put a freeze on hiring, and had targeted the Health Center as a special budgetary problem. The first hirings by the Health Center were made on a priority of commitment basis and included members of protected classes. Dr. Joshi's continuing application then apparently became the focal point of a struggle between Dr. Ooten and Dr. Hunter; the issues being the number of doctors the Center would be allowed, the qualifications of those hired, and the amount of input by other staff physicians in hiring procedures. The committee of physicians who interviewed Dr. Joshi

had reservations about her qualifications and wanted a larger applicant pool from which to choose. (Dr. Go, a female Filipino doctor on the committee, testified specifically that she had some questions about Plaintiff's qualifications.) Finally, when a position opened up, Plaintiff found herself in competition with Dr. Hunter, the former director of the Health Center, who was stepping down to the position of staff physician. Dr. Hunter was obviously better qualified than Dr. Joshi and was hired. The committee which recommended Dr. Hunter also recommended that Plaintiff's application be "tabled" and that further advertisement for doctors take place before any more hiring was done. (Plaintiff's Exhibit 13).

In July, 1976, Plaintiff advertised

in the Tallahassee Democrat that she was associating in the practice of family medicine with a doctor in a neighboring county. Although her application remained on file at the Health Center, Plaintiff did not renew that application. In September, 1976, two more physicians were hired upon recommendation of the physicians' committee: a white male and an Indian male. Based on the above subsidiary facts, Defendants have met their burden of showing legitimate reasons for not hiring the Plaintiff.

If the employer meets the burden of showing legitimate non-discriminatory reasons for its actions, the plaintiff then must show that the articulated reasons were pretextual. McDonnell at 804. Plaintiff has failed to show that the Defendants' actions were a pretext

for discrimination. She points to the fact that she was interviewed, more than once, by a physicians' committee, after having been approved for employment by Dr. Hunter. The Defendants presented evidence to show that formation of the committee was due to the desire of staff physicians to have more input in the hiring process and to the need for screening committees under affirmative action mandates. Plaintiff also points to Dr. Hunter's testimony that he had never before recommended hiring a physician and had that recommendation rejected. The Defendants presented credible evidence to show that budgetary constraints were beginning to be felt at the University at just about the time that Plaintiff was being considered for employment, that the struggle between

Dr. Hunter and Dr. Ooten for control of the Health Center had recently come to the fore, and that Dr. Hunter's complete control over hiring was unacceptable to some members of the Health Center staff. As her most telling example of pretext by the Defendants, Plaintiff offered the testimony of Dr. Yolande Mason that Dr. Rond (Director of the Health Center following Dr. Hunter's resignation) had told her in April, 1976, not to inform the Plaintiff of the resignation of one of the Center doctors. The court accepts Dr. Mason's testimony as true, but given the complete history of Dr. Joshi's involvement with the Health Center, finds that Dr. Rond's unwillingness to inform Dr. Joshi of a potential opening is not sufficient to convert the Defendants' reasons for not hiring Plaintiff into a

pretext for discrimination. Dr. Rond's comment to Dr. Mason (which he does not remember making) came after the physicians' committee had recommended "tabling" the Plaintiff's application (Plaintiff's Exhibit 13, letter of March 17, 1976).

The Defendants' best evidence to counter allegations of pretext consists of the Health Center track record in hiring of minorities and women. The unrefuted statistical evidence presented at trial showed that during the entire period under consideration in this suit, the Health Center employed greater proportions of minority and female doctors than were available in the labor market. The Health Center, which maintains a staff of approximately 10 doctors, has employed a Filipino woman, a black woman, a white woman, an Indian male, and a

black male as staff physicians.

In summary, Plaintiff's complaint of employment discrimination can be broken down into three separate situations. In August, 1975, Plaintiff was not hired because of budgetary problems: four physicians were authorized to be hired, and Plaintiff's name was number five on the list of those recommended. From August, 1975, until January, 1976, Dr. Hunter continued to press for the employment of the Plaintiff, with Dr. Ooten continuing to refuse authorization. During this time, Dr. Joshi was not hired due to continuing budget problems and because of the power struggle between Doctors Hunter and Ooten described previously.[1] The

1 No other doctors were hired during this period, and it is questionable whether, for purposes of this second situation, Plaintiff has met the fourth requirement of the McDonnell prima facie test: that the position in question remain open. McDonnell at 802.

third instance of contact between Dr. Joshi and the Health Center occurred in March, 1976, when Dr. Hunter had resigned as director and was being interviewed, along with the Plaintiff, for a staff physician position. Although the proceedings in this third instance were probably pretextual, in that Dr. Hunter was probably assured of receiving the job before any interviewing occurred, the procedure was not a pretext for invidious discrimination but for retaining a valued long-time employee. Following Dr. Hunter's hiring as a staff physician, the Plaintiff was in a different position: the physicians' committee had recommended that her application be "tabled", she had advertised her employment in a neighboring county, and the Health Center had a new director. The evidence shows

that the next hiring of new doctors did not take place until September of 1976, when the Plaintiff was no longer actively in the running for employment at the Health Center.

In a Title VII case, the ultimate burden of persuasion by a preponderance of the evidence rests on the Plaintiff. Jepsen v. Florida Board of Regents, No. 77-2969 (5th Cir. Feb. 6, 1980), citing Causey v. Ford Motor Co., 516 F.2d 416, 420 n. 6 (5th Cir. 1975). The employer complained of is not required to prove the absence of discriminatory motive, only that a legitimate non-discriminatory reason accounted for its action. Board of Trustees v. Sweeney, 439 U.S. 24 (1978). The Supreme Court has recognized that "[c]ourts are generally less competent than employers to restructure bus-

iness practices," Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978), and this principle applies even when a foreign-born woman becomes entangled in the workings of a large University. This unlucky circumstance does not constitute employment discrimination under Title VII.

Accordingly, it is ORDERED:

This action is dismissed with prejudice as to all Defendants, with costs to be borne by the Plaintiff.

DONE AND ORDERED this 22d day of February, 1980.

/s/ Lynn C. Higby
LYNN C. HIGBY
UNITED STATES DISTRICT JUDGE

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

October Term, 1980

Dr. Anjali A. Joshi, Plaintiff-Appellant,

v.

Florida State University, et al.,
Defendants-Appellees.

No. 80-5200

D.C. Docket No. TCA 78-0844

Appeal from the United States District Court for the Northern District of Florida

Before TUTTLE, RONEY and VANCE, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed; and that this cause be, and the same is hereby remanded for further proceedings to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the

defendants-appellees pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

June 1, 1981

Opposition

Office - Supreme Court, U.S.
FILED
OCT 10 1981
ALEXANDER L. STEVAS
CLERK

CASE NO. 81-510

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FLORIDA STATE UNIVERSITY, et al.,

Petitioners,

v.

DR. ANJALI A. JOSHI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUMMARY OF ARGUMENT

The decision rendered by the United States Court of Appeals for the Fifth Circuit comports with the body of law established by this Court surrounding disparate treatment employment discrimination and, in particular, this Court's latest pronouncement in Texas Department of Community Affairs vs. Burdine, __U.S. __, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The decision below conflicts with no decision of this Court or of another Appeals Court and it presents no important question of federal law which justifies the grant of a writ of certiorari.

ARGUMENT

Petitioners' principal argument that "the appeals court has erroneously required the Employer to prove its articulated, nondiscriminatory reasons for not hiring Plaintiff by a preponderance of the evidence" is without foundation or merit. To the contrary, the United States Court of Appeals for the Fifth Circuit clearly followed the dictates of Burdine in arriving at their decision. Petitioners correctly state that they are not required to prove legitimate nondiscriminatory reasons by a preponderance of the evidence. At the time the decision below was rendered, the Fifth Circuit was well aware of this Court's pronouncement to that effect and fashioned its decision strictly in accordance with the law of this Court. There is absolutely

no express nor implied language in the decision below which puts any burden on Defendant other than that which is set forth by this Court in Burdine. Petitioners unwittingly acknowledge this by failing to direct this Court's attention to any particular provision in the decision below which could be interpreted as an erroneous statement of law.

Petitioner complains of having any burden in an individual employment discrimination case. In that sense, they have misread the clear pronouncement of this Court on that issue. Although there is no burden on the employer to prove anything by a preponderance of the evidence, a burden of producing legitimate evidence does shift to the employer upon Plaintiff's presentation of a prima facie case.

This Court set forth the criteria for that burden as follows:

> To accomplish this, the Defendant [Employer] must clearly set forth, through the introduction of admissible evidence, the reasons for the Plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the Defendant. (Emphasis supplied) Burdine, supra, 67 L.Ed.2d at 216.

What Petitioner really complains of herein is that the Court of Appeals found that their meager so-called proof was legally insufficient. Consider the following holdings from the decision below:

> ...We conclude that Dr. Joshi made out a prima facie case of employment discrimination in this final instance under the McDonnell Douglas standards and that the Defendants have as yet failed to show a legitimate reason for their failure to hire her;

and

> On remand, the District Court must determine whether the Defendants produced or are

> now able to offer evidence of a legitimate, nondiscriminatory reason explaining their failure to hire Dr. Joshi and produced evidence that those ultimately chosen had qualifications equal to those of the Plaintiff. Burdine, supra.

Respondent would therefore respectfully suggest that Petitioner has either (1) misinterpreted the decision below or (2) requested this Court to change and increase the burden established for Plaintiffs from this Court's standard set forth in Burdine, supra. If the Court below erred in any respect, it did so in favor of Petitioner by giving Petitioner another bite at the apple after failing to present legitimate evidence and carry its burden at the original trial.

Furthermore, Petitioner's reliance upon Northwest Airlines Inc. v. Transport Workers Union of America,

49 U.S.L.W. 4383 (April 20, 1981), is misplaced. There, the employer, who is not even impliedly a "beneficiary" of that statute attempted to create a new cause of action for which there was not precedent or supporting statutory language. On the other hand, the statutory language was enacted for the special benefit of a class of which Respondent Joshi is a member. In addition, the statutory language is certainly broad enough to include a remedy suggested, but not dictated, by the lower Court. This Court has stated on several occasions that the primary objective of Title VII is prophylactic. Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). More than once, this Court has held "that the purpose of Congress investing broad equitable

power in Title VII Courts was 'to make possible the "fashioning of the most complete relief possible"' and that the District Courts have 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' Albemarle Paper Company v. Moody, 422 U.S., at 421, 418, 45 L.Ed.2d 280, 95 S.Ct. 2362." At best, Petitioner's argument is premature and highly speculative since the District Court has not had an opportunity to even consider the remedy question, including attorney's fees.

Finally, the Appeals Court did not wholly reject consideration of employer's statistical evidence as Petitioner would suggest. In fact, the lower court clearly stated that "such

statistical evidence might be relevant to negate an inference of discriminatory motive..." The Court of Appeals was simply pointing out in the footnote which Petitioner considers objectionable that the statistical evidence presented herein, standing alone, was and is insufficient to rebut a prima facie case of a specific individual in a disparate treatment case. Since the employer presented no other legitimate evidence, the Appeals Court was simply following this Court's decision in Furnco Construction Corp. v. Waters, 438 U.S. 567 at 580 (1978), where it was held that such statistical "proof neither was nor could have been sufficient to conclusively demonstrate that Furnco's actions were not discriminatorily motivated...". Petitioner has again unfortunately misinterpreted the clear and lawful

dictates of the United States Court of Appeals.

CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of appeals correctly followed the established law of this Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Brief in Opposition to Petition for Certiorari were mailed to Gene T. Sellers, Counsel, State Board of Education, Knott Building, Tallahassee, Florida 32301, and Gerald B. Jaski, University Attorney, Suite 212, Westcott Building, The Florida State University, Tallahassee, Florida 32306, this 7th day of October, 1981.

Stephen Lindsey Gorman

STEPHEN LINDSEY GORMAN